

CONTRACTOR'S WARRANTY

[Note – unless otherwise instructed items in italics are to be included only in warranties to funds]

DEED dated and delivered [] 20[]

BETWEEN the Contractor *the Employer* and the Beneficiary named in the Particulars below and in consideration of the payment of one pound (receipt of which is hereby acknowledged) by the Beneficiary to the Contractor

1. PARTICULARS

- | | | |
|------|---------------------------------------|---|
| 1.1. | Contractor | [] Company Number: [] Registered Office: [] |
| 1.2. | Beneficiary | [] Company Number: [] Registered Office: [] |
| 1.3. | Employer | [] Company Number: [] Registered Office: [] |
| 1.4. | Development | the Employer's development at [] in which the Beneficiary is interested as [] |
| 1.5. | Building Contract | the contract dated [] under which the Contractor has been appointed to [design and] construct the Development |
| 1.6. | Minimum PI Cover | [£ (pounds)] for each and every claim or series of claims arising from the same original cause or event [and in the aggregate annually in respect of pollution and contamination related claims] |
| 1.7. | Relevant Period | the period from the date of this Deed until 12 years from the date of practical completion (having the same meaning as under the Building Contract) of the Development |
| 1.8. | <i>Beneficiary's Agreement</i> | <i>the Agreement dated [] and made between the Beneficiary and [] under which the Beneficiary agrees to provide finance for the</i> |

carrying out of the Development

1.9. **Documents**

means all drawings details plans reports calculations specifications bills of quantities and other documents of any nature whatsoever and any designs contained in them (and any works executed from them) provided by or on behalf of the Contractor in the course of performing its obligations under the Building Contract

2. EXERCISE OF SKILL AND CARE

2.1. The Contractor warrants and undertakes to the Beneficiary that it has performed and will continue to perform its obligations under the Building Contract

2.2. The Contractor further warrants and undertakes to the Beneficiary that in carrying out its design related obligations under the Building Contract it has exercised and will continue to exercise all the reasonable skill care and diligence required under the Building Contract to see that:

2.2.1. it has not specified or used and will not specify or use in relation to the Development any products or materials not in conformity with relevant British or European Standards or Codes of Practice or which at the time of use are widely known to design consultants of the relevant profession in the United Kingdom to be deleterious to health and safety or to the durability of buildings and/or other structures and/or finishes and/or plant and machinery in the particular circumstances in which they are used

2.2.2. it notifies the Beneficiary in writing forthwith if in the performance of its duties under the Building Contract the Contractor becomes aware that it or any other person has specified or used or authorised or approved the specification or use by others of any such products or materials (provided that this Clause 2.2.2 does not create any additional duty for the Contractor to inspect or check the work of others which is not required by the Building Contract)

2.2.3. to the extent that the Contractor is responsible for the design of the Development its design will comply with all relevant legal requirements including without limitation the requirements of any relevant planning building regulations waste environmental or other authority or consent licence or approval of which the Contractor is or could reasonably be expected to be aware

3. LICENCE TO USE DOCUMENTS

- 3.1. Copyright and registered and unregistered design right in all Documents will remain vested in the Contractor but the Contractor now grants (or if such a grant cannot legally take place until a later date agrees to grant) to the Beneficiary with effect from the date of this Deed or in the case of Documents not yet in existence with effect from the date of their creation an irrevocable royalty free non-exclusive licence (such licence to remain in full force and effect notwithstanding the completion of the Contractor's obligations or termination of its employment under the Building Contract or any dispute under the Building Contract or this Deed) to use and reproduce all Documents for any purpose whatsoever connected with the Development (including but without limitation the execution completion maintenance letting advertisement modification extension reinstatement and repair of the Development). Such licence will carry the right to grant sub-licences and will be transferable to third parties
- 3.2. The Contractor will not be liable for any use the Beneficiary may make of the Documents for any purpose other than that for which they were originally provided unless the Contractor authorises such use and confirms that the Documents are suitable for it
- 3.3. The Contractor warrants that the Documents (save to the extent that sub-contractors have been used to prepare them) are and will be its own original work and that in any event their use in connection with the Development will not infringe the rights of any other person. The Contractor further warrants that where sub-contractors have been or are used their work is and will be original and that it will obtain the necessary consents in relation to Clause 3.1
- 3.4. The Contractor agrees that on the Beneficiary's reasonable request at any time and following reasonable prior written notice it will give the Beneficiary or those authorised by it access to the Documents and will provide copies of them (including copy negatives and/or CAD disks or other approved electronic versions) at the Beneficiary's reasonable expense
- 3.5. The Contractor now waives and agrees to waive and not to assert (and agrees to procure that any sub-contractors do likewise) all moral rights in the Documents under Chapter IV of the Copyright, Designs and Patents Act 1988

4. INSURANCE

- 4.1. The Contractor warrants to the Beneficiary that it holds professional indemnity insurance which will cover its potential design related liabilities under this Deed in an amount and on a basis at least equal to the Minimum PI Cover and that it will maintain such insurance with reputable insurers carrying on business in the United Kingdom throughout the Relevant Period provided that such insurance is generally

available in the market to design and build contractors with good claims records at a commercially reasonable cost and on commercially reasonable terms (and if not so available then the Contractor shall maintain such reduced level of or reasonable alternative insurance as is so available and is acceptable to the Beneficiary acting reasonably). For the avoidance of doubt payment of any increased or additional premiums required by insurers by reason of the Contractor's own claims record or other acts omissions matters or things peculiar to the Contractor will be deemed within the Contractor's obligation and what is commercially reasonable will be judged by reference to what is being done by design and build contractors with good claims records

- 4.2. The Contractor shall notify the Beneficiary in writing from time to time of any change in its professional indemnity insurance arrangements as set out above and within seven days of the Beneficiary's request at any time the Contractor will produce for inspection documentary evidence as to compliance with this Clause 4 and that payment has been made in respect of the last premium payment due
- 4.3. If the Contractor fails to comply with its obligations under this Clause 4 the Beneficiary may take out insurance to cover some or all of the loss or damage which could result from a breach of the Contractor's obligations under this Deed and may recover the costs and expenses of taking out such insurance from the Contractor

5. RELIANCE BY THE BENEFICIARY

The Contractor acknowledges that the Beneficiary shall unless the contrary is clearly proved be deemed to have relied upon the performance by the Contractor of the Contractor's obligations under the Building Contract

6. ASSIGNMENT

- 6.1. The Beneficiary may without the consent of the Contractor assign (but no more than twice):
 - 6.1.1. the benefit of all or any of the Contractor's obligations under this Deed; and/or
 - 6.1.2. any benefit arising under or out of this Deed
- 6.2. Assignment by way of security and re-assignment following discharge of that security and assignments between companies which are part of the same group shall not count towards the number of assignments without consent permitted by clause 6.1 but shall be deemed to always have consent. Companies are part of the same group if the same person or persons exercise ultimate control over at least 50% of the voting rights in respect of both companies.

- 6.3. The Contractor will not contend that any permitted assignee is precluded from recovering any loss resulting from any breach of this Deed (whatever the date of such breach) by reason only that that person is an assignee and not the original Beneficiary under this Deed or by reason that the original Beneficiary or any intermediate Beneficiary escaped any loss resulting from such breach by reason of the disposal of any interest in the Development or that the original Beneficiary or any intermediate Beneficiary has not suffered any the same or as much loss

7. EXTENT OF LIABILITY

- 7.1. The rights and benefits conferred upon the Beneficiary by this Deed are in addition to any other rights and remedies the Beneficiary may have against the Contractor including without prejudice to the generality of the foregoing any remedies for negligence
- 7.2. The Contractor shall have no greater liability to the Beneficiary under this Deed than the Contractor would have had if the Beneficiary and the Employer jointly had appointed the Contractor under the Building Contract but the Beneficiary shall not be affected (unless it has approved it in writing) by any subsequent variation of the Building Contract or the waiver compromise or withdrawal of any claim made by the Employer under it and the Contractor shall not be entitled to set off any sums due under the Building Contract from sums due to the Beneficiary or to claim or counterclaim payment of any sum from the Beneficiary under this clause 7
- 7.3. The Contractor's liabilities under this Deed will not be in any way reduced or extinguished by reason of any enquiry inspection or approval of the Documents or attendance at site meetings or other enquiry or inspection that the Beneficiary may make or procure to be made for its benefit or on its behalf or any failure of the Beneficiary to enquire inspect attend or approve
- 7.4. The liability of the Contractor under this Deed shall cease on the expiry of the Relevant Period save in relation to any claims notified by the Beneficiary to the Contractor in writing before its expiry
- 7.5. The parties to this Deed do not intend that any of its provisions shall be enforceable by any person by virtue of the Contracts (Rights of Third Parties) Act 1999

8. NOTICES

Any notice to be given under this Deed will be sufficiently served if sent by hand by facsimile transmission or by post to the registered office or if there is none the last known address of the party to be served. Any notice sent by hand will be deemed to be served on delivery and any notice sent by facsimile transmission will be deemed to be served in full at the time

properly recorded on the sender's facsimile report sheet provided that if any notice sent by hand or facsimile is sent after 4.45 pm on any day it will be deemed to be served on the next day. Any notice sent by post will be deemed to have been duly served 48 hours after the time of posting if the end of that period falls before 4.45 pm and otherwise on the next day

9. GOVERNING LAW

This Deed and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with English Law and the parties shall submit to the exclusive jurisdiction of the English courts (but without prejudice to the right of the parties to bring proceedings in any other jurisdiction to enforce a decision of the English courts)

10. STEP IN RIGHTS

10.1. *The Contractor shall not:*

- 10.1.1. *terminate the Building Contract or its employment under it;*
- 10.1.2. *treat the Building Contract or its employment under it as having been terminated or repudiated by the Employer;*
- 10.1.3. *discontinue or suspend the performance of any of its obligations under the Building Contract;*

before giving to the Beneficiary 28 days' prior written notice (7 days' in the case of suspension for non payment). The notice shall give particulars of any alleged breach of the Building Contract by the Employer

10.2. *The Beneficiary:*

- 10.2.1. *upon a breach of the Beneficiary's Agreement (other than a breach by the Beneficiary) or upon the Beneficiary being entitled to terminate the Beneficiary's Agreement or any obligations of a party under it due to that party's insolvency; or*
- 10.2.2. *within 28 days of receipt of a notice given under Clause 10.1;*

may give notice to the Contractor that the Contractor is to accept the instructions of the Beneficiary or its nominee instead of the Employer under the Building Contract

10.3. *Upon the Contractor's receipt of the notice referred to in Clause 10.2:*

- 10.3.1. *the Contractor shall comply with it and shall not do any of the things referred to in Clauses 10.1.1, 10.1.2 or 10.1.3;*
- 10.3.2. *the Building Contract shall continue in full force and effect as if none of the rights of the Contractor referred to in Clause 10.1 had arisen but the Contractor shall be liable to the Beneficiary and its nominee (if any) under the Building Contract in lieu of its liability to the Employer;*

10.3.3. *the Beneficiary or its nominee shall as soon as practicable remedy any breach of the Building Contract by the Employer which is capable of remedy by them and in particular shall pay any sums outstanding under the Building Contract (but where notice was given under Clause 10.1 excluding any which were not clearly notified to the Beneficiary as being outstanding prior to the service of notice by the Beneficiary under Clause 10.2); and*

10.3.4. *if so requested by the Beneficiary the Contractor shall enter into a new contract with the Beneficiary or its nominee in the same terms as the Building Contract but with such amendments as are reasonably required to put the parties in substantially the same position they would have been in if instead of having a new contract they had instead continued to operate the existing Building Contract under the other provisions of this clause 10 (including for the avoidance of doubt clause 10.4); but*

Provided that this shall not affect or derogate from any right of action the Employer may have against the Contractor in respect of any breach of the Building Contract or other default by the Contractor under or in connection with the Building Contract occurring prior to the date of service of the notice by the Beneficiary under clause 10.2 or where the Contractor has wrongfully terminated or treated as terminated or discontinued or suspended performance of its obligations under the Building Contract or its employment under it or has wrongfully treated it as having been terminated or repudiated by the Employer

10.4. *If any notice given by the Beneficiary under Clause 10.2 requires the Contractor to accept the instructions of the Beneficiary's nominee the Beneficiary shall be liable to the Contractor as guarantor for the payment of all sums from time to time due to the Contractor from the Beneficiary's nominee*

10.5. *Any notice which is given under Clause 10.1 or 10.2 shall be copied concurrently to the Employer*

10.6. *The Employer the Beneficiary and the Contractor acknowledge that the Contractor shall:*

10.6.1. *rely upon and shall not question a notice which the Beneficiary gives to it under Clause 10.2 as conclusive evidence (for the purpose of Clause 10.2 only) of a breach of the Beneficiary's Agreement;*

10.6.2. *not breach the Building Contract if the Contractor complies with this Clause 10*

10.7. *Any notice which the Contractor gives under Clause 10.1 shall not constitute a waiver of any of its rights under the Building Contract*

- 10.8. *Under the Building Contract the Contractor is obliged to execute and/or procure that its sub-contractors execute collateral warranties in favour of certain third parties. The Contractor shall execute and/or procure the execution of any such collateral warranty when requested by the Beneficiary notwithstanding that it may not have been requested by the Employer and notwithstanding any dispute under or termination of the Building Contract or the Contractor's employment under it but provided that where both the Employer and the Beneficiary request the execution of the same collateral warranty the Contractor shall not be obliged to execute more than one original of the same collateral warranty*
- 10.9. *Where the Contractor has given to any other person rights in relation to the Contract similar to those contained in this Clause 10 then if both the Beneficiary and any such other person serve notice under Clause 10.2 or its equivalent the notice served by the Beneficiary will [prevail/prevail over any notice except one served by [name]]".*

11. EXECUTION AND DELIVERY

This document is executed as a deed and is delivered on the date stated at the beginning of this deed. This document may be signed in any number of separate counterparts, each of which when signed and dated shall be an original, and such counterparts taken together shall constitute one and the same agreement.

EXECUTED AS A DEED BY

LIMITED

**ACTING BY [A] [NAME OF] DIRECTOR
IN THE PRESENCE OF:**

.....

DIRECTOR

WITNESS' SIGNATURE:

WITNESS' NAME:

WITNESS' ADDRESS:

I CONFIRM THAT I WAS PHYSICALLY PRESENT WHEN SIGNED THIS DEED

EXECUTED AS A DEED BY

LIMITED

**ACTING BY [A] [NAME OF] DIRECTOR
IN THE PRESENCE OF:**

.....

DIRECTOR

WITNESS' SIGNATURE:

WITNESS' NAME:

WITNESS' ADDRESS:

I CONFIRM THAT I WAS PHYSICALLY PRESENT WHEN SIGNED THIS DEED

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**ACTING BY [A] [NAME OF] DIRECTOR
IN THE PRESENCE OF:**

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DIRECTOR

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